

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM A.K. TITELMAN,
Plaintiff

CIVIL ACTION

v.

RITE AID CORPORATION,
Defendant

NO. 00-2865

ORDER

AND NOW, this 23^d day of September, 2002, upon consideration of Franklin C. Brown's Motion to Quash Third Party Deposition Subpoena, or in the Alternative, to Modify the Third party Deposition Subpoena to Postpone the Deposition of Franklin C. Brown (Docket #60), and Franklyn Bergonzi's Motion to Quash Third Party Deposition Subpoena, or in the Alternative, to Modify the Third Party Deposition Subpoena to Postpone the Deposition of Franklyn Bergonzi (Docket #59), the plaintiff's Response in Opposition thereto (Docket #61), Franklyn Bergonzi's Reply (Docket #63), Franklin C. Brown's reply (Docket #68), and the plaintiff's sur reply thereto, IT IS HEREBY ORDERED THAT the Motions are GRANTED in part and DENIED in part, as follows.

Franklin C. Brown and Franklyn M. Bergonzi, former officers of the defendant Rite Aid who have been indicted for securities fraud in connection with their former employment, have moved to quash a third party subpoena, or to postpone the

deposition until after their criminal trial. The allegations in the complaint against the former officers and directors of Rite Aid are encompassed by the allegations in the indictment. There appears to be *no* question that, at any deposition, the movants would invoke their Fifth Amendment right against self-incrimination in response to most, if not all, substantive questions asked by the plaintiff. At the time **of** the filing of the motion, the criminal trial had been scheduled for September 9, 2002; but the movants had requested a continuance of one year. Discovery in this case is scheduled to end on December 16, 2002, and trial is set for April **21**, 2003.

The Court applies the following principles to resolve this dispute. There is no absolute right to quash **a** subpoena in a civil case because the potential witness will have a right to refuse to answer most, if not all, questions propounded to him. Ordinarily, the witness must appear at the deposition, and refuse to answer individual questions that are objectionable. Nat'l Life Ins. Co. v. Hartford Accident & Indemnity Co., et. al., 615 F.2d 595, 598-99 (3d Cir. 1980).

It is possible that if the movants do invoke their Fifth Amendment rights, the plaintiff would be entitled to an adverse inference against Rite Aid. RAD Serv., Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271, 275-76 (1986); Baxter v.

~~Palmigiano~~, 425 U.S. 308, 318, 47 L. Ed. 2d 810 (1976). It is premature to make any decision on this point at this time.

If the movants are deposed in this case, the Court would not allow the kind of questioning that occurred in ~~Brink's Inc. v. City of New York, et. al.~~, 717 F.2d 700 (2d. Cir. 1983) cited in RAD Serv., Inc., 808 F.2d at 276. The Court agrees with Judge Winter's views, in dissent in ~~Brink's~~. The Court would allow only enough questioning for the plaintiff to establish that the deponent will invoke the Fifth Amendment in response to all questions on a certain topic. In addition, the plaintiff's questions would have to be open-ended and not leading in the way the questioning was in Brink's.

The Court is sensitive to the fact that discovery places unique pressures on non-parties to a civil proceeding subpoenaed to provide testimony while simultaneously defending related criminal proceedings. ~~Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, et. al.~~, 87 F.R.D. 53 (E.D. Pa. 1980). The Court agrees with the concerns expressed by Judge Pollack in Golden Quality.

In an effort to apply these legal principles and to balance the competing interests here, the Court orders that the **depositions** will be **postponed** at **least** until all other discovery in this case is complete. The Court understands from the

plaintiff's pending motion to compel discovery, that the plaintiff has not reviewed the "400 boxes" of documents in a storage facility in Washington, D.C. If after the completion of all other discovery, the plaintiff believes that he still needs the testimony of Messrs. Brown and Bergonzi, he may apply to the Court for permission to take the depositions.

BY THE COURT:


MARY A. McLAUGHLIN, J.

Filed 9/24/02:

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